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No. 90-408

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,

Petitioners/Cross-respondents,

vs.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,

Respondent/Cross-petitioner.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 6 of the General Allotment Act (25 U.S.C Sec. 349) continue as congressional consent to state taxation of Indian-owned fee patent land located within recognized Indian Reservations, subsequent to the passage of the Indian Reorganization Act of 1934 and other Congressional legislation which repudiated the Allotment Acts and the assimilation policies behind them?

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The respondent/cross-petitioner, Confederated Tribes and Bands of the Yakima Nation, respectfully prays that a Writ of Certiorari issue to review the Amended Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-named case on June 7, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 903 F.2d 1207, and is reprinted in the Appendix to Yakima County's Petition beginning at page 1a. The memorandum decision of the U.S. District Court for the Eastern District of Washington was not reported. It is reprinted in the appendix to Yakima County's Petition beginning at page 34a.

JURISDICTION

This action was initiated by the respondent/cross-petitioner, by complaint which invoked the jurisdiction of the federal courts under 28 U.S.C. 1331 and 28 U.S.C. 1362. Summary judgment in favor of the respondent/cross-petitioner was entered by the District Court on May 10, 1988. Notice of Appeal of this summary judgment was filed by the petitioners/cross-respondents on June 8, 1988.

The order and amended opinion of the Court of Appeals of which the respondent/cross-petitioner now seeks review, was issued May 16, 1990, at which time cross-petitions for rehearing were already pending based on the Court's original opinion which had been filed January 9, 1990. The pending cross-petitions for rehearing were denied by order entered June 7, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Writ of Certiorari is requested under Supreme Court Rule 10.1. This cross-petition is filed pursuant to Supreme Court Rule 12.3. The petition of Yakima County was filed September 5, 1990, and was received September 7, 1990.

STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS INVOLVED

A. *Statutes*: This case involves Section 6 of the Act of February 8, 1887 (24 Stat. 390), as amended by the Act of May 8, 1906 (34 Stat. 182), now codified as 25 U.S.C. 349, which reads as follows:

> 349. Patents in fee to allottees
>
> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in Section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extend to any Indians in the former Indian Territory."

This case also involves the definition of "Indian country" found at 18 U.S.C. Sec. 1151, which reads as follows:

> "Except as otherwise provided in Sections 1154 and 1156 of this title, the term 'Indian country' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through said reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same."

B. *Treaties*: This case involves the *Treaty With the Yakimas*, 12 Stat. 951.

C. *Constitutional Provision*: This case involves Article I, Section 8, Clause 3:

> "To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

STATEMENT OF THE CASE

The Confederated Tribes and Bands of the Yakima Nation (Yakima Nation) entered into a Treaty with the United States after a treaty council which occurred in 1855 near Walla Walla, Washington. In the *Treaty With the Yakimas*, 12 Stat. 951, the Yakima Nation ceded, relinquished and conveyed to the United States, approximately 10,800,000 acres of land which the tribes were then dominating and controlling. In conjunction with the passing of control to the 10.8 million acres of land, the

Yakima Nation reserved for its "exclusive use and benefit" a relatively smaller area of land now designated as the Yakima Indian Reservation.

The Yakima Indian Reservation is approximately 1,300,000 acres in size, most of which is located in Yakima County, Washington. Of the 1.3 million acres, approximately 80 percent or 1.04 million acres is held in trust by the United States for the benefit of the Yakima Nation and its individual members. The remaining 260,000 acres of fee patent land is held in fee by non-Indians and members of the Yakima tribe.[1] The fee patent land is scattered throughout the reservation in true checkerboard fashion.

After the *Treaty With the Yakimas* was ratified by Congress, white men began to settle and populate the territory. In 1889, the Washington State Constitution was adopted and the state of Washington became admitted to the union of the United States. While Washington was beginning the statehood process, Congress adopted the General Allotment Act of 1887 (Dawes Act). The Dawes Act was amended in 1906 by the Burke Act and 25 U.S.C. Sec. 349 was amended to read as it now reads today. The stated purpose and philosophy of Congress in passing Allotment legislation, was to assimilate Indian people into a white society, absorbing them into the mainstream of American life. This would necessarily result in eventual destruction of tribal governments and would aid in

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[1] The Yakima Nation itself also has an ownership interest itself in some fee lands.

the assimilationist's goal of having the same laws apply to Indians that applied to whites.[2]

Pursuant to Allotment legislation, land was allotted to Yakima people within the Yakima Indian Reservation.[3] After the trust periods expired for a number of allotments, many Yakima allottees received deeds in fee patent allowing the transfer and conveyance of such land to non-Indians. Yakima allottees who received fee patent ownership were subjected to state/county property taxes pursuant to Section 6 of the General Allotment Act (25 U.S.C. Sec. 349) and the authority of *Goudy v. Meath*, 203 U.S. 146 (1906). By 1934, the policy of allotment and assimilation was acclaimed to be a dismal failure, and Congress responded by passing the Indian Reorganization Act. Trust periods were extended indefinitely for Indian allotments to which a fee patent had not been issued on most reservations, including the Yakima Indian Reservation.[4]

With the support of the Indian Reorganization Act of 1934, and subsequent Congressional legislation aimed at strengthening tribal government, the Yakima Nation has maintained its tribal government intact from the time of

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[2] *Cohen's Handbook of Federal Indian Law*, 1982 Edition, pp. 127-134, which information was presented to the Ninth Circuit.

[3] Not all land was allotted on the Yakima Indian Reservation pursuant to the General Allotment Act. Surplus land was allotted on this reservation by Act of December 21, 1904, 33 Stat. 595, and by other Congressional legislation.

[4] Trust periods were extended indefinitely on the Yakima Indian Reservation by Executive Order Nos. 3630, 4168, 5746, 7036. Yakima allottees, continuing to hold their property in trust, are not subject to state/county property taxation.

the Treaty, to the present. The Yakima Nation has approximately 7,600 enrolled members, most of whom reside on the Yakima Indian Reservation. Neither the Yakima Nation nor any of its members challenged the continued viability of 25 U.S.C. Sec. 349, until 1987.

On November 9, 1987, the Yakima Nation, on its own behalf and on behalf of its members owning fee patented land within the reservation, brought an action in the United States District Court for the Eastern District of Washington, challenging the lawful authority of Yakima County to impose and collect ad valorem property taxes on the fee lands owned by the Yakima Nation and its members within the reservation. At that time, at least 104 enrolled members were identified as owning 139 parcels of fee land within the Yakima Indian Reservation. The action was brought in response to efforts by Yakima County to sell 28 of the 139 fee patented parcels at county tax sale. Shortly after commencement of the lawsuit, the District Court entered an order restraining the pending tax sales.

Following cross-motions for summary judgment, the District Court granted summary judgment in favor of the Yakima Nation, ruling that the General Allotment Act and 25 U.S.C. Sec. 349 was inconsistent with the Indian Reorganization Act of 1934, and modern Congressional legislation. The District Court relied heavily on this Court's opinion in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1979) to support its decision.

The decision of the District Court was appealed by Yakima County to the Ninth Circuit Court of Appeals. On January 9, 1990, the Ninth Circuit announced its initial

decision reversing and remanding the matter back to the District Court. The Ninth Circuit amended its decision on May 16, 1990, and denied the pending cross-petitions for rehearing by order entered June 7, 1990.

REASONS FOR GRANTING THE WRIT

This Court should grant the Writ of Certiorari because the decision of the Court of Appeals directly conflicts with a decision of the Arizona Supreme Court which prohibits the ad valorem taxation of Indian-owned fee patented land on recognized reservations in Arizona; directly conflicts with decisions of this Court regarding state's lawful authority to impose state taxes on Indians and Indian lands within an Indian reservation; and raises an important question of law that this court should resolve.

The Supreme Court for the state of Arizona had this identical question before it in *Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1029 (1981). This state court of last resort ruled that Arizona had no lawful authority to tax Indian-owned fee patent land within the Navajo Indian Reservation. The Arizona Supreme Court relied upon the Congressional definition of "Indian Country" found at 18 U.S.C. Sec. 1151, and upon this Court's discussion of state taxation of Indian lands and activities in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), in ruling that the Indian-owned fee patent land was *not subject* to state property taxation. The Arizona court concluded that under 18 U.S.C. Sec. 1151, the properties'

status as trust or non-trust was not determinative of the taxable status of land.

In its opinion, the Ninth Circuit fails to even mention *Battese*. The Ninth Circuit opinion cannot possibly be reconciled with *Battese*. The Ninth Circuit instead adopted a balancing approach for testing whether states have lawful authority to tax Indian-owned fee land. The Ninth Circuit concluded that *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes*, 109 S.Ct. 2994 (1989) provided the proper legal analysis against which the issue of the state's lawful authority to tax Indian-owned fee land would be measured. The Ninth Circuit applied the *Montana/Brendale* analysis even though *Montana* and *Brendale* involved disputes between state and tribal governments over the right to regulate the *conduct of non-Indians on reservation fee lands*. Neither *Montana* nor *Brendale* concerns the extent of state jurisdiction over Indians on reservation fee lands. This irreconcilable conflict in result and approach between the Ninth Circuit and the Arizona Supreme Court can only be resolved by this Court's granting a Writ.

The Ninth Circuit opinion also conflicts with this Court's opinions in *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1979), *McClanahan*, and *Mescalero*. In *Moe*, this Court dispelled and found "untenable" Montana's argument that Section 6 of the General Allotment Act (25 U.S.C., Sec. 349), as construed by *Goudy v. Meath*, 203 U.S. 146 (1906), continued as Congressional consent to the state's assertion of jurisdiction, including taxing jurisdiction, over Indians residing on fee patent lands of a reservation. This Court reminded Montana that the policy of allotment and assimilation, existing when *Goudy* was

decided, was *repudiated* in 1934 by the Indian Reorganization Act, and that there was no decisional authority giving the meaning Montana contended to Section 6 of the General Allotment Act in the face of the *many and complex jurisdictional statutes* directed at the reach of state law within reservation lands. *Moe v. Salish & Kootenai Tribes*, at 479.

In the face of the clear mandate of the *Moe* opinion, the Ninth Circuit states the following:

> "We conclude that the legal effectiveness of Section 6 of the General Allotment Act has not been superseded or otherwise rendered void by subsequent statutes. Although we acknowledge that the Indian Reorganization Act repudiated the allotment policy, we do not find this repudiation of policy sufficient grounds to refuse to give Section 6 its proper legal effect."

903 F.2d at 1215 – page 21a to Yakima County's petition.

The Ninth Circuit opinion is an erosion of *Moe* principles and must be corrected.

The Ninth Circuit further confuses the effect of the *Moe* decision and the validity of Section 6 of the General Allotment Act by its "proviso" discussion.[5] The Ninth Circuit seems to be saying that even though the general jurisdiction grant to states in 25 U.S.C. Sec. 349 *may have been* rendered null or ineffective by the *Moe* interpretation of subsequent Congressional legislation, the tax "proviso" of the statute, if *limited* only to questions of taxation of fee patent land, remains as affirmative consent from

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[5] 903 F.2d at 1213 and 1214 – pp. 16a-18a to Yakima County's petition.

Congress to states, and grants states jurisdiction to impose property taxes. The Ninth Circuit failed to support this "proviso" analysis with any decisional authority. If this opinion is not corrected and is permitted to stand, some states will conceivably attempt to tax Indian-owned fee land and not have the necessary jurisdiction over individual Indians required to enforce the subsequent eviction or ejectment of the Indian from land the state attempts to sell at tax sale.[6]

The Ninth Circuit opinion also conflicts with *McClanahan* and *Mescalero*. In *McClanahan*, this Court stated in response to Arizona's argument that there should be a distinction between taxes on land and taxes on income the following:

> "However relevant the land-income distinction may be in other context, it is plainly irrelevant when, as here, the tax is resisted because the *state is totally lacking in jurisdiction over* both the people and *the land it seeks to tax*. In such a situation, the state has no more jurisdiction to reach the income generated on reservation lands than to tax the land itself."
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> (Emphasis supplied.)

McClanahan at 181.

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[6] For example in Washington, assessment of property taxes and tax foreclosures for non-payment are in rem proceedings. *Palin v. Sherman*, 35 Wn.2d 806, 233 P.2d 105 (1951). As such, the taxing entity does not warrant title to land sold at tax sale. *Carlson v. Stair*, 3 Wn.App. 27, 472 P.2d 598 (1970). Subsequent actions against an Indian to remove him from his land by a quiet title or ejectment action require in personam jurisdiction over the Indian. RCW 7.28.010 *et seq*. Such in personam jurisdiction would not exist as the general jurisdictional grant to states over Indians on reservation fee land has been rendered ineffective by the Indian Reorganization Act and *Moe*.

In *McClanahan's* companion case, *Mescalero,* this Court reemphasized the lesson of *McClanahan* stating:

> "Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, *there has been no satisfactory authority for taxing Indian reservation lands* or Indian income from activities carried on with the boundaries of the reservation."
>
> (Emphasis supplied.)

Mescalero at 148.

The Ninth Circuit opinion barely pays lip service to these landmark decisions leaving those concerned with this issue completely in the dark as how its opinion can be reconciled with this Court's long line of decisions which deal with states' efforts to tax Indian people and their lands.

The Ninth Circuit opinion also conflicts with this Court's decision in *DeCoteau v. District Court,* 420 U.S. 425, 426 n.2 (1975), and *California v. Cabazon Band of Indians,* 480 U.S. 202, 207 n.5 (1987). In both *DeCoteau* and *Cabazon,* this Court ruled that the definition of "Indian country" found at 18 U.S.C. Sec.1151 generally applied to questions of civil jurisdiction as well as criminal jurisdiction. The Ninth Circuit opinion limits the application of 18 U.S.C. Sec. 1151 strictly to questions of criminal jurisdiction in spite of the unmistakable language of *DeCoteau* and *Cabazon.*

Finally, the issue of whether states can tax the fee patent lands of Indian people on a recognized reservation is a very important question of federal law which has not been, but should be, settled by this Court. This Court has

previously addressed virtually all disputes involving the application of various state taxes on Indian reservations, except the question of taxing Indian-owned fee lands. After *McClanahan, Moe,* and *Battese,* several states voluntarily ceased assessing property taxes on Indian-owned fee lands within several reservations[7]. The Ninth Circuit decision leaves all states and counties in confusion as to the status of the law. The Ninth Circuit opinion will lead to fact finding litigation for every Indian tribe and state/county not able to resolve this question by settlement. A Writ is certainly warranted to resolve this important federal issue.

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[7] The State of Oregon discontinued taxation of Indian-owned fee lands after issuance of an opinion from a Deputy Attorney General dated March 31, 1982. The State of Idaho discontinued taxation of Indian-owned fee lands after issuance of an opinion from an Assistant Attorney General dated March 14, 1983. The State of North Dakota discontinued taxation of Indian-owned fee lands after issuance of Attorney General Opinion 85-12.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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